(28,401)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 446.

ERNEST G. WALKER, PLAINTIFF IN ERROR,

vs.

GENEVIEVE K. GISH.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 1, 1921.

1 Court of Appeals of the District of Columbia.

No. 3482.

ERNEST G. WALKER, Appellant,

vs.

GENEVIEVE K. GISH.

Supreme Court of the District of Columbia.

At Law.

No. 58280.

GENEVIEVE K. GISH, Plaintiff,

vs.

ERNEST G. WALKER, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Complaint in the Municipal Court.

Filed July 27, 1915.

In the Supreme Court of the District of Columbia.

No. 58280.

GENEVIEVE K. GISH, Plaintiff,

vs.

ERNEST G. WALKER, Defendant.

The plaintiff sues the defendant for money due and payable from the defendant to the plaintiff for the appropriation and use of a party wall located on premises 2327 Ashmead Place, Washington, District of Columbia, and claims the sum of One Hundred and Fifty Dollars ($150.00) as and for the value of the same.

HENRY F. WOODARD,
Attorney for Plaintiff.

2 *Certificate of Municipal Court on Appeal.*

Filed July 27, 1915.

* * * * * * *

Date.	Proceedings.
1915.	
	Plaintiff's attorney—H. F. Woodard.
	Defendant's " —S. H. Giesy.
June 28th.	Bill of particulars filed. Summons and copy issued returnable July 6—11 A. M.
" 30th.	Summons returned "summoned as within directed."
July 6th.	Continued by defendant to July 9—10 A. M.
" 8th.	Subpœna d. t. and copy issued by defendant.
" "	" " " returned "served, etc."
" 9th.	Trial—witnesses sworn.
" "	Judgment for plaintiff for $144.63 with interest and costs.
" 16th.	Appeal, notice of, filed.
" "	" undertaking on with E. Stevens, surety, approved and filed.
" 19th.	Appeal, record on and papers filed with Clerk of Supreme Court, D. C. and notice sent to defendant's attorney.

This is to certify, that the foregoing is a true copy of the Docket Entries and of all the proceedings had before the said Court in the above cause, and that the annexed documents are all the original papers filed in said cause.

Witness the Honorable Judges of said Court this 19th day of July, A. D. 1915.

F. G. AUKAM,
Clerk,
By BLANCHE NEFF,
Assistant Clerk.

Costs paid by Plaintiff, $2.10.
Costs paid by Defendant, $4.65.

(Endorsed.)

The Clerk will please docket this appeal, enter my appearance and issue Summons to Appellee.

S. HERBERT GIESY,
Atty. for Appellant.

Memorandum.

May 12, 1919.—Verdict for plaintiff for $85.00.

3 Supreme Court of the District of Columbia.

Friday, June 13th, 1919.

Session resumed pursuant to adjournment, Hon. Wendell P. Stafford, Justice presiding.

* * * * * * *

Come now the parties hereto by their respective attorneys of record and thereupon the motion for a new trial heretofore submitted to the court, having been considered is hereby overruled and judgment on verdict is ordered. Wherefore, it is considered that the plaintiff recover of the defendant and Edward Stevens, his surety, the sum of Eighty-five Dollars ($85.00), with interest thereon from this date together with costs of suit to be taxed by the clerk and have execution thereof.

From the foregoing judgment, the defendant, by his attorney, in open court, notes an appeal to the Court of Appeals; whereupon, the penalty of a bond to operate as a supersedeas. is hereby fixed in the sum of Two Hundred Dollars.

Memoranda.

June 25, 1919.—Supersedeas Bond approved and filed.
July 28, 1919.—Bill of Exceptions submitted.

Supreme Court of the District of Columbia.

Tuesday, October 19th, 1920.

Session resumed pursuant to adjournment, Hon. F. L. Siddons, Justice presiding.

* * * * * * *

Before Judge Stafford.

Come now the parties hereto by their respective attorneys of record, and thereupon, the Court signs the Bill of Exceptions taken at the trial of this cause and heretofore submitted, and now hereby orders the same of record nunc pro tunc.

Assignment of Errors.

Filed November 29, 1920.

* * * * * * *

1. The Court erred in admitting the testimony of Morris Hacker as to the value of, one half the party wall, which might have
4 been used by the defendant, without evidence that the portion of the wall so valued was used.

2. The Court erred in refusing to allow Morris Hacker to answer the questions put to him on cross examination.

3. The Court erred in not admitting in evidence the certified copy of the deed conveying the property 2327 Ashmead Place to the plaintiff and directing the jury to return a verdict for defendant, because the plaintiff was not the owner of the half of the party wall for which she sought to recover, and therefore not the proper party plaintiff, the deed under which she claims not having conveyed any part of the party wall not on Lot 248 in Pumphrey and Baynes' subdivision of Lot numbered 19 "Washington Heights."

4. That the Court erred in refusing to instruct the jury in accordance with defendant's prayers 2, 3 and 4 as such refusal amounted to a denial that the Building Regulations in relation to independent walls have the force and effect of law.

5. That the Court erred in refusing to instruct the jury in accordance with defendant's prayer No. 5 and holding that whether an independent wall was built in accordance with the Building Regulations, which are the law on the subject for the District of Columbia, was a matter of fact for the jury and not a matter of law for the Court and in not therefore directing a verdict for the defendant.

6. That the Court erred in refusing to instruct the jury in accordance with defendant's prayer No. 6 for if it would have been unlawful for defendant to use plaintiff's party wall the remedy would not be for a use contrary to law but for the removal of an unlawful wall.

7. That the Court erred in refusing to instruct the jury in accordance with defendant's prayer No. 8 for the right to use your neighbor's land for the erection of a party wall sounds in contract and the wall must be of mutual benefit and common use and any other taking of land is confiscatory and in contravention of the Fifth and Fourteenth Amendments of the Constitution.

8. That the Court erred in refusing to instruct the jury in accordance with defendant's prayer No. 9 for a party wall must be of mutual benefit or common use or the plaintiff is not entitled to recover therefor.

9. That the Court erred in refusing to instruct the jury in accordance with defendant's prayer No. 10 for the right to erect a party wall one half on your neighbor's lot is based on a contract in the deeds from the original proprietors to Beall and Gantt trustees for the purpose of laying out and establishing the Federal City and defendant's land being without the bounds of the original city is unaffected by such contract and unless defendant's consent or contractual agreement thereto has been secured the use and occupation of defendant's land was without just compensation and due process of law and in contravention of the Fifth and Fourteenth Amendments of the Constitution and a verdict for the defendant should have been directed.

10. That the Court erred in refusing to instruct the jury in accordance with defendant's prayer No. 11 for if plaintiff's wall could not be lawfully used it was a nuisance and not of mutual benefit and common use.

S. HERBERT GIESY,
Attorney for Defendant.

Designation of Record.

Filed November 29, 1920.

* * * * * * *

The Clerk will please prepare the transcript in the above entitled cause for filing on appeal in the Court of Appeals and include therein:

1. Complaint and Certificate of Clerk of Municipal Court on Appeal.
2. Verdict of the jury.
3. Entry of judgment.
4. Memo. Entry of Appeal.
5. Memo. Approved and filing of bond.
6. Memo. Bill of Exceptions filed and submitted.
7. Order allowing Bill of Exceptions.
8. Assignment of Errors.
9. This order.

S. HERBERT GIESY,
Attorney for Defendant.

Service of copy of the above designation of the record acknowledged this 29 day of Nov., 1920.

HENRY F. WOODARD.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 6, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed copy of which is made part of this transcript in cause No. 58280 at Law, wherein Genevieve K. Gish is Plaintiff and Ernest G. Walker is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington in said District, this 4th day of December, 1920.

[Seal of the Supreme Court of the District of Columbia.]

MORGAN H. BEACH,
Clerk.

E. W.

6 In the Supreme Court of the District of Columbia.

At Law.

No. 58280.

GENEVIEVE K. GISH, Plaintiff,

vs.

ERNEST G. WALKER, Defendant.

Bill of Exceptions.

Be it remembered that upon the trial of the above entitled cause before the Honorable Wendell P. Stafford, one of the Justices of said Court, and a jury duly impaneled and sworn, the following proceedings were had:

The plaintiff, to maintain the issue on her part joined, called as a witness MORRIS HACKER who in substance testified that the value of the plaintiff's wall on premises No. 2327 Ashmead Place used by the defendant was $144.63.

To the foregoing testimony, the defendant, by his counsel objected on the ground that defendant could have built an independent party wall, and that, unless it was shown that he had not, the testimony was irrelevant, and should not go to the jury.

The objection was, by the Court, overruled and exception allowed.

The following questions on cross examination were propounded to the witness, were objected to by the plaintiff, objection sustained and exceptions duly allowed:

"If the Gish wall had not been there, you say Walker would have had to build a 13 inch wall?

If Walker could have built such a wall, would it have been of sufficient thickness for Gish to have used it for a party wall?

Had Gish used it as a party wall, how much of the wall would he have had to pay for?

This would have left how much for Walker to pay for?

Q. Because the Gish party wall was there, how much wall did your office require Mr. Walker to build?

Q. If your office required him to pay for one half of the Gish wall, how much wall would Walker have to build or pay for?

Q. Well, if in this case, Mr. Walker should be required to pay

for half of the Gish wall, how much wall would he have to build or pay for?

Q. Your estimate of $144 for the value of the Gish wall, if it is held that it was used by Walker, is for what thickness of wall?

Q. If Walker should pay the amount of your estimate $144, would he do so in disregard of the relief from reimbursing Gish granted by Section 74 of the Building regulations, or because he did not comply with that section by building an independent wall?

7 Q. Did you prepare this estimate because, as Building Inspector, you found the wall was not an independent wall?

And thereupon the witness further testified upon cross examination as follows:

Q. What was the purpose of making the wall 13 inches on top?
A. That was for fire protection, principally.
Q. Was that done under the requirements of the Building Inspector?
A. Yes.
Q. Does it protect the walls from the weather?
A. To a certain extent, yes.
Q. So that is a requirement of the building inspector, is it?
A. Yes, a requirement of the building regulations.

The plaintiff, to further maintain the issue on her part joined, gave evidence by JOHN B. KINNEAR, GENEVIEVE K. GISH the plaintiff, and others, who testifies in substance as follows:

That plaintiff was the owner of premises No. 2327 Ashmead Place prior to and during the year 1915 and ever since; that the west half of said party wall was built on plaintiff's land and the other half on the lot adjoining, which was owned by the defendant; that plaintiff's house was a two-story building; that the defendant erected a three-story house on his lot adjoining plaintiff's party wall; that defendant ran up a nine inch wall along and beside plaintiff's party wall until the top of said party wall was reached, and at that point defendant widened out his nine inch wall to a thirteen inch wall and carried it over and upon the Gish wall about four inches; that the four inches rested upon the Gish wall in the front of the Building for a distance of about four or five feet, the four inches which lapped over was mortared solidly to the Gish wall and formed a part of the same; that from that point back to the end of the wall, it rested at intervals upon the plaintiff's wall; that the chimney of the Gish house had been extended up and bound into the Walker wall; that the party wall recess on the front was overlapped by the front bricks of defendant's house; that a plaintiff made a demand upon the defendant to pay her for the use of the party wall, which was refused, and that plaintiff had had the value of the wall ascertained by the then Building Inspector, Mr. Morris Hacker; that upon cross examination the plaintiff testified that she bought the property 2327 Ashmead Place from one Pumphrey and that the party wall was there at the time of her purchase.

The foregoing is, in substance, all of the testimony offered by the plaintiff.

That thereupon the defendant to maintain the issue on his part joined, gave evidence tending to prove by his witnesses, JOHN P. HEALEY, Building Inspector of the District of Columbia, THOMAS A. LANE, Boss Bricklayer, Major EDWARD G. CURTIS, Assistant Building Inspector and the defendant, that they had examined the wall built by the defendant, Ernest G. Walker, adjoining premises No. 2327 Ashmead Place; that it was an independent nine inch wall;
8 that when the Walker wall reached the top of the Gish wall standing on the property line between the two premises 4½ inches on each side, that the Walker wall was widened to a thickness of thirteen inches and overlapped the Gish wall, but did not depend upon the Gish wall for support in any way. That where the overlapping occurred it was effected by a course of headers, and these were laid so that they did not rest on the Gish wall, but the Gish roof, having an incline of course the line of headers would come in contact with the Gish wall when they reached the incline.

That thereupon the line of headers would be raised to the next course of brick above and continued until they again came in contact with the incline of the Gish roof, then they would be again raised one course of brick, and in this way the weight of the Walker wall was kept off of the Gish wall; that in front the Gish wall had been carried up four feet above the roof to carry the false mansard roof in front of the house, and that upon the top of this portion of wall for a length of about four feet, the overlap of the Walker wall was made without headers.

That the chimney of the Gish wall was not disturbed but was carried up above the top of the Walker wall and *and* the east wall of the chimney and the overlap of the Walker wall were the same at that point.

That thereupon, as part of defendant's case, a certified copy of the deed from George C. Pumphrey, et al., to Genevieve K. Gish was offered in evidence, for the sole purpose of showing that the plaintiff was not the proper party to recover in this case.

The offer was refused and an exception noted.

Certified copy of the deed so offered is as follows:

Recorded June 14, 1913, at 11.35 A. M.

This deed, made this twelfth (12) day of June in the year one thousand nine hundred and thirteen, by and between George C. Pumphrey and wife, Annie Pumphrey and John F. Bayne and wife Estelle Bayne, all of the District of Columbia, parties of the first part, and Genevieve K. Gish, also of the said District of Columbia, party of the second part.

Witnesseth, That in consideration of Ten Dollars, the parties of the first part, do hereby grant unto the party of the second part, in fee simple, all that piece or parcel of land, together with the improvements, rights, privileges and appurtenances to the same belonging, situate in the District of Columbia, described as follows to wit:

Lot numbered Two Hundred and Forty eight (248) in Pumphrey and Bayne's subdivision of Lot numbered Nineteen (19) "Washington Heights," as per plat recorded in the Office of the Surveyor for the District of Columbia, in Liber 47 at folio 136. Subject to covenants of record.

And the said parties of the first part covenant that they will warrant specially the property hereby conveyed, and that they will execute such further assurances of said land as may be requisite.

9 Witness their hands and seals the day and year hereinbefore written.

GEORGE C. PUMPHREY. [SEAL.]
ANNIE PUMPHREY. [SEAL.]
JOHN F. BAYNE. [SEAL.]
ESTELLE BAYNE. [SEAL.]

In the pr-sence of
S. A. TERRY.

DISTRICT OF COLUMBIA, *To wit:*

I, S. A. Terry, a Notary Public in and for the District aforesaid, herby certify that George C. Pumphrey, Annie Pumphrey, John F. Bayne and Estelle Bayne who are personally well known to me as the grantors in, and the persons who executed the aforegoing and annexed deed, dated June 12, A. D. 1913, personally appeared before me in the said District, and acknowledged the said deed to be their act and deed.

Given under my hand and seal this 12th day of June, 1913.

[SEAL.] S. A. TERRY,
Notary Public, D. C.

The foregoing was, in substance, all of the testimony offered by the defendant.

The following instructions were offered on behalf of the defendant Walker; that all of said instructions were objected to by the plaintiff with the exception of instructions numbered one and seven; that the Court refused defendant's instructions numbered two, three, four, five, six, eight, nine, ten and eleven, and allowed numbers one and seven. To which ruling defendant excepted and exception was allowed.

Defendant's Prayer No. 1.

If the jury believe from the evidence that the defendant did not use the wall owned by plaintiff but elected to and did build an independent wall, entirely on his own lot, the plaintiff cannot recover.

Granted.
W. P. S.

Defendant's Prayer No. 2.

If the jury believe from the evidence that the wall owned by the plaintiff was a nine inch wall and not a thirteen inch wall, as the

Building Regulations require it to be, to permit its use by defendant as a party wall; defendant had an election to remove it and erect a thirteen inch wall or erect an independent nine inch wall by the side thereof and the election by the defendant to erect an independent nine inch wall as provided by the building regulations was a right given him by law and the plaintiff cannot recover.

Refused.

Ex.

W. P. S.

Defendant's Prayer No. 3.

If the jury believe from the evidence that the wall owned by the plaintiff was a nine inch wall and for the house the defendant constructed on the adjoining lot it could not lawfully be used as a party wall or defendant's houses attached thereto, but such use would have been in defiance of the Building Regulations and the defendant complied with the Building Regulations and erected an independent wall in accordance with such regulations, the plaintiff cannot recover.

Refused.

Ex.

W. P. S.

Defendant's Prayer No. 4.

If the jury believe from the evidence that the defendant preferred to build and did build an independent new wall by the side of the old wall, belonging to plaintiff, he is relieved from reimbursing the adjoining owner, the plaintiff, for her former outlay in building the party wall and the plaintiff cannot recover.

Refused.

Ex.

W. P. S.

Defendant's Prayer No. 5.

If the jury believe from the evidence that the plaintiff's wall could not be used as a party wall by defendant, it not being thirteen inches thick as required by Section 55 of the Building Regulations for dwellings exceeding two stories, the defendant was required, then, to erect a new wall on the site of the plaintiff's wall of the required thickness or an independent wall by the side thereof, not less than nine inches thick, and whichever he elected to do, he was discharged by law; the Building Regulations; from liability to the owner for a wall he could not use as a party wall and the plaintiff cannot recover.

Refused.

Ex.

W. P. S.

Defendant's Prayer No. 6.

If the jury believe from the evidence that plaintiff erected on the division line between her lot and defendant's lot a nine inch wall

centered on said line without agreement with defendant, notice to him, or consent from him, there was no liability on defend-
11 ant to pay for such wall or any part thereof unless he assumed such liability by using and adopting such wall as a party wall; and if such wall could not be used as a party wall by defendant under the Building Regulations because it was a wall permitted only for a two story house and its use for a three story house would have been an infraction of the law, the liability for its use never accrued and the plaintiff cannot recover.

Refused.
Ex.
W. P. S.

Defendant's Prayer No. 7.

That if the jury believe from the evidence that the defendant erected an independent wall but that incidentally he used the wall of plaintiff, then the measure of damages is not one half the value of plaintiff's wall, but quantum meruit, what the use actually made of plaintiff's wall was worth to defendant.

Granted.
W. P. S.

Defendant's Prayer No. 8.

That if the jury believe from the evidence that plaintiff erected on six and a half inches of defendant's land, a party wall which was of no mutual benefit and common use, then the use and occupation of the land is confiscatory and the Building Regulations permitting it are in contravention of the Fifth and Fourteenth Amendments of the Constitution are unconstitutional and the plaintiff cannot recover.

Refused.
Ex.
W. P. S.

Defendant's Prayer No. 9.

If the jury believe from the evidence that the defendant erected an independent wall for the erection and maintenance of which the plaintiff's wall was not of mutual benefit and common use the plaintiff cannot recover.

Refused.
Ex.
W. P. S.

Defendant's Prayer No. 10.

If the jury believe from the evidence that plaintiff erected on six and one half inches of defendant's lot, a party wall without defendant's consent or contractural agreement thereto, both lots being with-

out the limits of the original City of Washington and unaffected by the terms and conditions of the deeds from the original proprietors, such use and occupation of the land of the defendant is without just compensation or due process of law and is in contravention of the Fifth and Fourteenth Amendments of the Constitution and the plaintiff cannot recover.

Refused.
Ex.
W. P. S.

Defendant's Prayer No. 11.

If the jury believe from the evidence that because of the presence of the Gish nine inch party wall defendant could not build a thirteen inch wall without first taking down the Gish wall, the last named wall being unusable for a three story house, but was required by the Building Inspector to build a nine inch independent wall and did build such independent wall under the supervision of the Building Inspector, the said Gish wall was a nuisance and not a mutual benefit and could not be of common use, the plaintiff cannot recover.

Refused.
Ex.
W. P. S.

The Court charged the Jury in accordance with the opinion of the Court of Appeals in the case of Genevieve K. Gish vs. Ernest G. Walker, namely, that the jury should determine whether there had been a use of the party wall by the defendant, and if they determined that issue in the affirmative, that they should then ascertain the reasonable value for such part of the party wall as was used; that if they found that the party wall was not used, that their verdict should be for the defendant.

To which instruction the defendant excepted because it did not include all the instructions asked for by defendant, which exception was duly allowed.

And comes here the defendant, by his attorney, and prays the Court to sign, seal and make part of the record, his Bill of Exceptions, taken at the trial of this cause, now for then, which is accordingly done this 19th day of October, 1920.

WENDELL P. STAFFORD,
Justice.

S. HERBERT GIESY,
Attorney for Defendant.

To Henry F. Woodard,
Attorney for the plaintiff:

Please take notice that the above Bill of Exceptions will be presented to the Supreme Court of the District of Columbia, in Circuit Court No. 2, before Mr. Justice Stafford for settlement on the 29

day of July, 1919, at 10 o'clock A. M., or as soon thereafter as counsel can be heard.

S. HERBERT GIESY,
Attorney for Defendant.

13 & 14 Service of copy of above Bill of Exceptions and notice of settlement acknowledged this 19th day of July, 1919.

HENRY F. WOODARD,
Attorney of Plaintiff.

[Endorsed:] At Law. No. 58280. Genevieve K. Gish, plaintiff, vs. Ernest G. Walker, defendant. Bill of exceptions. S. Herbert Giesy, attorney at law, Washington, D. C., National Union Building, 918 F Street.

Endorsed on cover: District of Columbia Supreme Court. No. 3482. Ernest G. Walker, appellant, vs. Genevieve K. Gish. Court of Appeals, District of Columbia. Filed Dec. 6, 1920. Henry W. Hodges, clerk.

15 & 16 In the Court of Appeals of the District of Columbia.

Monday April 4th, A. D. 1921.

* * * * * * *

No. 3482.

ERNEST G. WALKER, Appellant,

vs.

GENEVIEVE K. GISH.

The argument in the above entitled cause was commenced by Mr. S. H. Giesy, attorney for the appellant.

17 In the Court of Appeals of the District of Columbia.

Tuesday, April 5th, A. D. 1921.

* * * * * * *

No. 3482.

ERNEST G. WALKER, Appellant,

vs.

GENEVIEVE K. GISH.

The argument in the above entitled cause was continued by Mr. S. H. Giesy, attorney for the appellant, and was concluded by Mr. H. F. Woodard, attorney for the appellee.

18 In the Court of Appeals of the District of Columbia.

No. 3482.

ERNEST G. WALKER, Appellant,

vs.

GENEVIEVE K. GISH, Appellee.

Opinion.

Mr. JUSTICE ROBB delivered the opinion of the Court:

Appeal from a judgment for the plaintiff, appellee here, in the Supreme Court of the District, in a suit to recover compensation for the use of a party wall.

The bill of exceptions recites: "The Court charged the jury in accordance with the opinion of the Court of Appeals in the case of Genevieve K. Gish vs. Ernest G. Walker, (48 App. D. C., 42), namely, that the jury should determine whether there had been a use of the party wall by the defendant, and if they determined that issue in the affirmative, that they should then ascertain the reasonable value of such part of the party wall as was used; that if they found that the party wall was not used, that their verdict should be for the defendant." The former decision has become the settled law of the case, "not only for the trial court but for this court also," Warner vs. Grayson, 24 App. D. C., 55, 57; Thompson vs. Maxwell Land Grant Co., 168 U. S. 451.

It is contended, however, that in the prior appeal it did not appear that the builder of this party wall was a predecessor in title to plaintiff below, and hence that the plaintiff was without right to bring suit. In Eberly vs. Behrend, 20 D. C. 215 and Halpine vs. Barr, 21 D. C. 331, it was ruled that the purchaser of a lot with a party wall on it, in which the adjoining owner has not exercised his right, suc-

19 ceeds to the rights of the builder and is entitled to compensation when such wall is used by the adjoining owner. There is nothing inconsistent with the rule thus announced in Fowler vs. Koehler, 43 App. D. C., 349, wherein we held that the building owner might reserve to himself, when he conveyed his lot, the right to compensation for the use of the party wall. We are not disposed to disturb the rule that has been in force in this District for almost thirty years and, there being no reservation in appellant's deed, it follows that the judgment must be affirmed, with costs.

Affirmed.

20 In the Court of Appeals of the District of Columbia, April Term, 1921.

Monday, May 2nd, A. D. 1921.

* * * * * * *

No. 3482.

ERNEST G. WALKER, Appellant,
vs.
GENEVIEVE K. GISH.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per MR. JUSTICE ROBB,
May 2, 1921.

21 In the Court of Appeals of the District of Columbia.

No. 3482.

ERNEST G. WALKER, Appellant,
vs.
GENEVIEVE K. GISH, Appellee.

Motion for Writ of Error.

Now comes the appellant Ernest G. Walker and moves the Court to grant a writ of error in his behalf in the above entitled cause to the United States Supreme Court in order that the constitutional questions raised by the prayers in the Court below and argued in this Court may be reviewed and this Court may fix the amount of the bond to act as a supersedeas to be given on the granting of said writ.

And the appellant further moves that the mandate in this Court may be stai-d a reasonable time to perfect such writ of error.

S. HERBERT GIESY,
Attorney for Appellant.

Citing
Heald vs. District of Columbia, W. L. R., Vol. 48, folio 737.
Block vs. Hirst, W. L. R., Vol. 49, folio 242.

Service of copy of above motion at office acknowledged this 18 day of May, 1921.

VIRGINIA DUDLEY,
Stenographer of Attorney for Defendant.

22 [Endorsed:] No. 3482. Ernest G. Walker, appellant, vs. Genevieve K. Gish, appellee. Motion for writ of error and stay mandate. Court of Appeals, District of Columbia. Copy. Filed May 18, 1921. Henry W. Hodges, clerk.

23 In the Court of Appeals of the District of Columbia.

Tuesday, May 24th, A. D. 1921.

* * * * * * *

No. 3482.

ERNEST G. WALKER, Appellant,

vs.

GENEVIEVE K. GISH.

On consideration of the motion for the allowance of a writ of error to remove the above entitled cause to the Supreme Court of the United States and to stay the mandate, It is by the Court this day ordered that said motion be and the same is hereby denied.

24 In the Supreme Court of the United States.

ERNEST G. WALKER, Plaintiff in Error,

vs.

GENEVIEVE K. GISH, Defendant in Error.

Petition for Writ of Error Directed to the Court of Appeals of the District of Columbia.

To the Supreme Court of the United States:

Ernest G. Walker, appellant, in the case of the Court of Appeals, of the District of Columbia, entitled Ernest G. Walker, vs. Genevieve K. Gish, shows, by this, his petition, that in the records, proceedings and decisions in the said action, certified copy of the transcript of the record therein is submitted herewith as an exhibit hereto, manifest errors have occurred, greatly to the damage of said Ernest G. Walker.

I.

Your petitioner, Ernest G. Walker, was defendant in the action in the Supreme Court of the District of Columbia, wherein Genevieve K. Gish sought to recover for the use of a party wall, built one-half on the petitioner's land, without his consent.

The wall built by Genevieve K. Gish, or her predecessors in title, was a nine inch party wall, only permitted under the exception in section 56 of the Regulations Governing the Erection of Buildings,

in the District of Columbia, for two story houses, where the wall is not over 25 feet in height and 50 feet long.

25 Petitioner desired to erect a three story house and under section 74 of the said regulations which is in part as follows:

"But when the wall is safe and sufficient for the existing building, then the cost and expense of such repair or removal, together with the expense of the new wall or walls erected in lieu thereof, shall be borne and paid exclusively by the building owner. * * *

Provided that these regulations shall not be construed to justify to building owner in encroaching upon the premises of the adjoining owner beyond the party wall already built, or, in the case where no party wall has been built, more than nine inches without having first obtained the written consent of the adjoining owner of the premises to be encroached upon if in such case the building owner prefers to build an independent new wall by the side of the old wall he shall be relieved from reimbursing the adjoining owner for former outlay in building the party wall. The thickness of the new wall shall be determined by the Inspector of Buildings in each and every case but shall never be less than nine inches."

he had, therefore, to tear down the said nine inch wall and erect a 13 inch party wall, or erect an independent wall not less than nine inches thick, which would make the total wall between the houses above the cellar 18 inches, of which 13½ inches would be wholly on petitioner's land.

II.

The Regulations Governing the Erection of Buildings are a law of the United States, being promulgated under and by virtue of an act of Congress passed June 14, 1878, and if they take one citizen's property and give it to another without just compensation or due process of law the said regulations are confiscatory and in contravention of the Fifth and Fourteenth Amendments of the Constitution.

26

III.

Section 74 of the Regulations Governing the Erection of Buildings in the District of Columbia provides, in case the building owner prefers to build an independent new wall by the side of the old wall, he shall be relieved from reimbursing the adjoining owner for former outlay in building the party wall. But the Court of Appeals holds (Gish vs. Walker 48 Appeals D. C. 44) that if you elect to build such an independent wall you cannot use so much of your own land as under section 63 of said regulations is left as a reveal or recess of 4½ inches by 4½ inches to make the fronts of houses in the District of Columbia harmonious and architecturally artistic; that the chimneys of the old wall must not be carried up to make them useful to the builder of the original party wall, and the independent wall must not overlap the old wall, even so far as petitioner's building line. This is in effect authorizing the owner of an ad-

joining lot to take part of his neighbor's property without just compensation or due process of law, for if you would avoid liability for paying for the two story party wall, which cannot be used for a three story house, you must not overlap it, but the independent wall must be 13 inches instead of 9 inches, above the top of the party wall for a two story house, such as the Gish wall, the reason for this being shown by the testimony of the former Building Inspector Morris Hacker, on Page 7 of the record, 'that the wall of a three story house must be 13 inches thick for fire protection'.

The Court of Appeals in the decision in this case (48 Appeals D. C. 44) determined that a filling in of the reveal, which is wholly on the property of Ernest G. Walker, in compliance with the requirements of said Section 63, constituted the use of the two story wall, although the half brick required to fill in a 4½ inch reveal being bound into the new wall does not have to be attached in any way to the old wall for support. Anomalous, as it may
27 seem, this wall which can only be used for a two story house, is constructively used for a three story house by filling in a hole in said wall, required by the Regulations Governing the Erection of Buildings, Section 63, to be left for that purpose.

As a result of this interpretation of the said regulations, the law is that you must not use a party wall permitted for a two story house under Section 56 of the said regulations, for the support of a three story house in any way. However, you must have a 13 inch wall above the top of that two story wall, but, if you overlap the two story wall, that constitutes the use of it. So, that, in order not to use the two story wall, you have got to build a 13 inch wall wholly on your own property. This amounts to the taking of 4½ inches of Walker's property and giving it to Genevieve K. Gish, for the use of her house.

If you elect to tear down the existing wall and erect a 13 inch wall in its place on the party line, you are met with that portion of Section 74 of said regulations, which provides you may not encroach on the land of the first builder, beyond the face of the existing wall. So that 8½ inches of the new wall would have to be on the building owner's lot, and but 4½ inches on the lot of the first builder.

So, any way it is approached, Section 56 of the said regulations authorizes the construction of an alleged party wall on your neighbor's land, without his consent, which, if the building owner desires to build a three story house constitutes a nuisance and deprives him of the full use of his property. Whatever he does, he is required to pay the first builder for erecting on his land, something the law says he shall not use to support his house, and, if he would not pay for the nuisance, he must surrender to the first builder 4½ inches of his lot by the depth of the alleged party wall. This constitutes the taking of that much of his land and giving it to his neighbor, if the neighbor should build a two story house on his lot, before the building owner starts to improve his lot.
28 and the law which authorizes it is confiscatory and in contravention to the Fifth and Fourteenth Amendments of the Constitution.

IV.

This court has laid down the principle in the case of Smoot vs. Heyl, 227 U. S., 518, that a party wall, to be justified, must be of mutual benefit and common use, otherwise it constitutes a nuisance rather than a benefit. The Gish wall was clearly a nuisance rather than a benefit in the present instance. If torn down the expense of removal had to be borne by petitioner as well as any damage to defendant in error's property incident to such removal. If left standing it already occupied the 6½ inches which should have been all the land the petitioner was required to use for a wall on that side of his house. To build an independent wall required the loss of an additional nine inches of land and the loss of seven inches of interior space. By building a nine-inch wall instead of a thirteen inch wall, which his neighbor could have used, the defendant in error gained two inches of interior space. There can be no mutual benefit in such a situation, and the said regulation is confiscatory and takes the property of petitioner without just compensation and due process of law and is unconstitutional as being in contravention of the Fifth and Fourteenth Amendments.

V.

The relief from building a 13 inch wall is not just compensation for the land taken, for had the defendant in error built a wall for mutual benefit and common use petitioner would have had to use only 6½ inches of his lot and had seven inches more interior space within his house or had petitioner been free to build a 13 inch wall he would have had 6½ inches of wall to sell. But if the relief from building a 13 inch wall; fil-ing up the reveal; carrying up the chimney and overlapping the upper portion of the wall, so as to bring it to petitioner's building line, is an implied use, petitioner is not relieved from building a 13 inch wall, but is required to build
or pay for a 13½ inch wall, thus enabling defendant in
29 error by using petitioner's land to have only 4½ inches of
wall on her land and two inches more interior space in her house without any compensation at all, just or otherwise, to petitioner.

VI.

The Court of Appeals by the decision in this case has sustained the validity of an authority exercised under the United States and has interpreted that authority to empower it to take the property of one citizen and give it to another, and in addition thereto to require that citizen to pay for an improvement, useless to him, constructed on the land so taken. If such is the law, it is confiscatory and in contravention of the Fifth and Fourteenth Amendments.

VII.

The building regulations approved by President Washington October 17, 1791, were based on a contract in the deeds from the

owners of the lands embraced in the original Federal City, Fowler vs. Koehler, 43 App. D. C. 349, and are the right claimed by any one to locate his party wall one-half on his neighbor's land. In the present case there is no contractual privilege or easement and whatever rights in relation to party walls exist must accrue under the act of Congress passed June 14, 1878. If Section 74 of said regulations means, what the Court of Appeals interprets it to mean, that the useless party wall must be torn down or the independent wall so erected that it will in effect give to a neighboring owner without consideration 6½ inches of land; then an authority exercised under the United States, by virtue of an act of Congress, is confiscatory and in contravention of the Fifth and Fourteenth Amendments of the Constitution, as thereunder, not only the land of a neighboring owner is taken, but a use, by implication, may require an owner of land so taken, to pay for the use of a wall he is prohibited by law to use, besides, giving up 6½ inches of his lot.

30 *Assignments of Error.*

The Petiti-ner's Assignments of Error Numbers 7 and 9, based on his Prayers Numbers 8 and 10, for instructions to the Jury, occurring in the transcript of the record, page 4, are prayed to be taken as an assignment of errors with this petition.

Wherefore your petitioner prays:

That Writ of Error may issue to the Court of Appeals, district of Columbia, directing it to certify for review and determination, the case of Ernest G. Walker vs. Genevieve K. Gish, Number 3482, to be re-examined and affirmed, reversed or modified by this court as to it may seem meet upon giving by the petitioner of a supersedeas bond.

S. HERBERT GIESY,
Counsel for Petitioner.

Endorsed: In the Supreme Court of the United States. Ernest G. Walker, Plaintiff in Error, vs. Genevieve K. Gish, Defendant in Error. Petition for Writ of Error to the Court of Appeals, D. C. Court of Appeals, District of Columbia. Filed July 28, 1921. Henry W. Hodges, Clerk.

31 ERNEST G. WALKER, Plaintiff in Error,

v.

GENEVIEVE K. GISH, Defendant in Error.

Application for Writ of Error to the Court of Appeals of the District of Columbia.

In the case of this application for writ of error, I have some doubt as to its proper disposition. The question made is as to the validity of the Building Regulations of the District of Columbia, adopted by the authority of Congress, in so far as they permit the building

of a party wall, by one of two adjoining owners, of nine inches for a two-story house, and require that the other adjoining owner who wishes later to put up a three-story house shall only be permitted to do so by providing a thirteen-inch wall for that house. The question is whether the regulation restrictions upon the latter's freedom of action and the obligations he has to assume to his adjoining owner for the use of the party wall are not so much greater burdens than those of his neighbor as really to deprive him of the use of his property without due process of law.

Some doubt has been suggested as to whether the question was properly saved in the trial court and in the appellate court. Upon all these questions, however, without intimating an opinion, I think there is enough doubt to give the applicant an opportunity to present the questions on a writ of error. Therefore the writ will be allowed.

WM. H. TAFT,
C. J.

To the clerk of the U. S. Supreme Ct::

Let the writ issue—Bond 500.00.

W. H. T.

32 [Endorsed:] No. 3482. Ernest G. Walker, Appellant vs. Genevieve K. Gish. Order of Supreme Court U. S. Allowing Writ of Error. Court of Appeals District of Columbia. Filed July 28, 1921. Henry W. Hodges, clerk.

33 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you, or some of you, between Ernest G. Walker, appellant, and Genevieve K. Gish, appellee, No. 3482, a manifest error hath happened, to the great damage of the said appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-fifth day of July, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal of the Supreme Court of the United States.]

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by
WM. H. TAFT,
Chief Justice of the United States.

34 [Endorsed:] Court of Appeals, District of Columbia. Filed Jul. 28, 1921. Henry W. Hodges, clerk.

35 Know all men by these presents, That we, Ernest G. Walker, as principal, and Massachusetts Bonding and Insurance Company as sureties, are held and firmly bound unto Genevieve K. Gish in the full and just sum of Five Hundred dollars, to be paid to the said Genevieve K. Gish, her certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 14th day of July, in the year of our Lord one thousand nine hundred and twenty-one.

Whereas, lately at a term of the Court of Appeals of the District of Columbia in a suit depending in said Court, between Ernest G. Walker against Genevieve K. Gish, a judgment was rendered against the said Ernest G. Walker and the said Ernest G. Walker having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Genevieve K. Gish citing and admonishing her to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Ernest G. Walker shall prosecute — to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue and act as a supersedeas.

ERNEST G. WALKER. [SEAL.]

[Seal of Massachusetts Bonding and Insurance Company.]

MASSACHUSETTS BONDING AND INSURANCE CO.,
By GEORGE B. ROBEY, [SEAL.]
Atty. in Fact.

Sealed and delivered in presence of—
C. M. CURRAN.
G. CHALFONT.

Surety qualified.

MORGAN H. BEACH,
Clerk,
By ALF. G. BUHRMAN,
Asst. Clerk.

Approved to operate as a supersedeas by—
WM. H. TAFT,
Chief Justice of the United States.

36 [Endorsed:] No. 3482. Ernest G. Walker, Appellant, vs. Genevieve K. Gish. Supersedeas Bond on Writ of Error. Court of Appeals, District of Columbia. Filed July 28, 1921. Henry W. Hodges, Clerk.

37 UNITED STATES OF AMERICA, *ss:*

To Genevieve K. Gish, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Ernest G. Walker is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this twenty-fifth day of July, in the year of our Lord one thousand nine hundred and twenty-one.

WM. H. TAFT,
Chief Justice of the United States.

Service accepted this 28 day of July A. D. 1921.
HENRY F. WOODARD,
Atty. for Genevieve K. Gish.

38 [Endorsed:] Court of Appeals, District of Columbia. Filed Jul. 28, 1921. Henry W. Hodges, Clerk.

39 In the Court of Appeals of the District of Columbia.

No. 3482.

ERNEST G. WALKER, Appellant,
vs.
GENEVIEVE K. GISH, Appellee.

Assignment of Errors to be Argued in United States Supreme Court.

1. The Court erred in refusing to allow Morris Hacker to answer the following questions put to him on cross-examination:

If the Gish wall had not been there, you say Walker would have had to build a 13 inch wall?

If Walker could have built such a wall would it have been of sufficient thickness for Gish to have used it for a party wall?

Had Gish used it as a party wall, how much of the wall would he have had to pay for?

This would have left how much for Walker to pay for?

Because the Gish wall was there, how much wall did your office require Mr. Walker to build?

If your office required him to pay for one half of the Gish wall, how much wall would he have to build or pay for?

Well, if in this case, Mr. Walker should be required to pay for half of the Gish wall, how much wall would he have to build or pay for?

Your estimate of $144 for the value of the Gish wall, if it is held, it was used by Walker, is for what thickness of wall?

If Walker should pay the amount of your estimate $144, would he do so in disregard of the relief from reimbursing Gish granted by Section 74 of the Building Regulations, or because he did not comply with that section by building an independent wall?

Did you prepare this estimate because, as Building Inspector, you found the wall was not an independent wall?

2. That the Court erred in failing to determine or, consider the constitutional question raised by assignment of error No. 7 based on defendant's Prayer No. 8 in the trial court, for the right to use your neighbor's land for the erection of a party wall sounds in contract and the wall must be of mutual benefit and common use, and any other taking of land is confiscatory and in contravention of the Fifth Amendment of the Constitution, and such taking which enables the first builder to have 4½ inches of wall on her side of the party line instead of nine inches and forces the adjoining owner to have 17½ inches of wall on his side of the party line is taking property without due process of law or just compensation.

3. That the Court erred in failing to determine or consider assignment of error No. 8 based on Plaintiff in Error's Prayer No. 9 in the trial court, for it has been held by the United States Supreme Court, that a party wall to be justified and not unconstitutional, must be of mutual benefit and common use and to substitute the test of use for the test of usefulness, is to disregard the conditions which the Honorable Supreme Court has said will make a party wall an unconstitutional taking of land.

4. That the Court erred in failing to determine or consider the constitutional question raised by assignment of error No. 9 based on Plaintiff in Error's Prayer No. 10 in the trial court, for the right to erect a party wall one half on your neighbor's lot is based on a contract in the deeds from the original proprietors to Beall and Gantt trustees for the purpose of laying out and establishing the Federal City and Plaintiff in Error's land being without the *the* bounds of the original city is unaffected by such contract and unless Plaintiff in Error's consent or contractural agreement thereto has

been secured, the use and occupation of his land was without due process of law and just compensation and in contravention of the Fifth and Fourteenth Amendments of the Constitution.

S. HERBERT GIESY,
Attorney for Appellant.

41 [Endorsed:] No. 3482. Court of Appeals of the District of Columbia. Ernest G. Walker, Appellant, vs. Genevieve K. Gish. Assignment of Errors. Court of Appeals, District of Columbia. Filed July 29, 1921. Henry W. Hodges, Clerk.

42 Court of Appeals of the District of Columbia, April Term, 1921.

No. 3482.

ERNEST G. WALKER, Appellant,

vs.

GENEVIEVE K. GISH.

The Clerk, in the preparation of the Transcript of the Record on Writ of Error to the Supreme Court of the United States in the above entitled cause will include the following:

1. Printed Record.
2. Argument of the Case.
3. Opinion of the Court.
4. Judgment.
5. Motion for Writ of Error.
6. Order denying Writ of Error.
7. Petition for Writ of Error to the Supreme Court of the United States.
8. Order allowing Writ of Error.
9. Writ of Error.
10. Bond on Writ of Error.
11. Citation with Acceptance of Service.
12. Assignment of Errors.
13. This Designation.

S. HERBERT GEISY,
Attorney for Appellant.

Service accepted and designation satisfactory.
HENRY F. WOODARD,
Atty. for Appellee.

43 [Endorsed:] No. 3482. Court of Appeals of the District of Columbia. Ernest G. Walker, Appellant, vs. Genevieve K. Gish. Designation of Transcript of Record on Writ of Error to the Supreme Court of the United States. Court of Appeals, District of Columbia. Filed July 29, 1921. Henry W. Hodges, Clerk.

44 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 43 inclusive constitute a true copy of the transcript of record and proceedings of said Court of Appeals, as per designation of counsel, in the case of Ernest G. Walker, Appellant, vs. Genevieve K. Gish, No. 3482, April Term, 1921, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 29th day of July, A. D. 1921.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 28,401. District of Columbia Court of Appeals. Term No. 446. Ernest G. Walker, plaintiff in error, vs. Genevieve K. Gish. Filed August 1st, 1921. File No. 28,401.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 135.

ERNEST G. WALKER, PLAINTIFF IN ERROR

vs.

GENEVIEVE K. GISH, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

S. HERBERT GIESY,
Counsel for Plaintiff in Error.

LAW REPORTER PRINTING COMPANY, 518 FIFTH STREET NORTHWEST, WASHINGTON, D. C.

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Cases Cited.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 135.

ERNEST G. WALKER, PLAINTIFF IN ERROR

vs.

GENEVIEVE K. GISH, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

Plaintiff in error, Ernest G. Walker, was defendant in a suit brought by the defendant in error, Genevieve K. Gish to recover for the alleged use of an alleged party wall, built, one-half on appellant's land without his knowledge or consent.

The wall for which the defendant in error sought to recover was not built by her but "the party wall was there at the time of her purchase" (Rec., p. 7). It was a nine-inch party wall only permitted under the exception in section 56 of the Regulations Governing the Erection of Buildings in the District of Columbia, for two-story houses, where the wall is not over 25 feet in height and 50 feet long.

Plaintiff in error desired to erect a three-story house and under section 74 of the said regulations, which is in part as follows:

> "But when the wall is safe and sufficient for the existing building, then the cost and expense of such repair or removal, together with the expense

> of the new wall or walls erected in lieu thereof, shall be borne and paid exclusively by the building owner. . . . Provided, that these regulations shall not be construed to justify to building owner in encroaching upon the premises of the adjoining owner beyond the party wall already built, or, in the case where no party wall has been built, more than 9 inches without having first obtained the written consent of the adjoining owner of the premises so to be encroached upon. If in such case the building owner prefers to build an independent, new wall by the side of the old wall, he shall be relieved from reimbursing the adjoining owner for former outlay in building the party wall. The thickness of the new wall shall be determined by the inspector of buildings in each and every case, but shall never be less than nine inches."

he had, therefore, to tear down the said 9-inch wall and erect a 13-inch party wall, or erect an independent wall not less than 9 inches thick, which would make the total wall between the houses above the cellar 18 inches, of which 13½ inches would be wholly on petitioner's land.

Plaintiff in error elected to erect an independent 9-inch wall and attempted to do so under the guidance and direction of the Inspector of Buildings for the District of Columbia, but as a law abiding citizen he had to comply with certain requirements of the Regulations Governing the Erection of Buildings.

The evidence shows no actual use, of the portion of the wall on Walker's lot, claimed to be owned by defendant in error, but the said regulations required that when the top of the 9-inch party wall was reached plaintiff in error's wall should be widened to 13 inches (Rec., p. 7), which still left the wall wholly on Walker's ground and the face of the wall one-half inch on his

side of the party line. To avoid the weight of this overlap bearing on the wall alleged by defendant in error to belong to her, headers were used, and when the line of headers met the incline of the Gish roof they were raised a course of brick to keep the weight from the Gish wall (Rec., p. 8).

The said Regulations Governing the Erection of Buildings provide:

> "When the building owner increases the height of a party wall he shall carry up at his own expense all smoke flues and vent pipes connected with said wall which belongs to the adjoining property to a height of four feet above the new wall and new roof."
>
> Regulations Governing the Erection, etc., of Buildings, sec. 64.

Under this requirement of the said regulations the chimney of the Gish wall was not disturbed (Rec., p. 8) but carried up above the top of the Walker wall, for the benefit of Gish, not Walker, the overlap of the Walker wall providing an east wall for the chimney (Rec., p. 8).

Whoever built the party wall, admittedly not Gish, (Rec., p. 7) was as law abiding as Walker tried to be, even if he had no particular concern or consideration for a neighbor who might be rich enough to desire a three-story house, and complied with the following requirement of the said regulations:

> "And in all cases where a building is erected and a party wall constructed the party line shall be carefully preserved by receding four and one-half inches from the front with that portion that extends over the line, except in center of continuous blocks."
>
> Regulations Governing the Erection, etc., of Buildings, sec. 63.

This left a reveal 4½ inches by 4½ inches wholly on plaintiff in error's land and which the building regulations require to be left for the use of the building owner, so that houses in the Districts of Columbia may be more correct architecturally, and have no unsightly breaks between them.

If filling in this reveal left for that purpose constitutes a use of a wall built by one's neighbor, then in order to avoid the use of the wall the building owner must abandon part of his lot. This is in effect authorizing the owner of an adjoining lot to take part of his neighbor's property without just compensation or due process of law, for he gives nothing in return for the land so taken. Under the said regulations a party wall built for a two-story house can not be used for a three-story house, so it must be torn down if the building owner would use his own land. It constitutes a nuisance, the cost of removal of which is not upon the creator of the nuisance but upon the owner of the land taken without his consent, should he desire to use his own land.

"But the building regulations further provide that these regulations shall not be construed—

> "to justify to building owner in encroaching upon the premises of the adjoining owner beyond the party wall already built."
>
> Regulations Governing the Erection, etc. of Buildings, section 74.

So that under these regulations if the builder of a two-story house gets there first and erects his or her wall 9 inches thick (just barely what the regulations require), and the building owner desires to erect a three-story house and elects to tear down the 9-inch wall he must erect a 13-inch wall 8½ inches on his land and 4½ inches on the first builder's land.

This is confiscatory legislation and in contravention of the Fifth and Fourteenth Amendments of the Constitution.

Assignment of Errors.

1. The court erred in refusing to allow Morris Hacker to answer the following questions put to him on cross-examination:

If the Gish wall had not been there, you say Walker would have had to build a 13-inch wall?

If Walker could have built such a wall would it have been of sufficient thickness for Gish to have used it for a party wall?

Had Gish used it as a party wall, how much of the wall would he have had to pay for?

This would have left how much for Walker to pay for?

Because the Gish wall was there, how much wall did your office require Mr. Walker to build?

If your office required him to pay for one-half of the Gish wall, how much wall would he have to build or pay for?

Well, if in this case, Mr. Walker should be required to pay for half of the Gish wall, how much wall would he have to build or pay for?

Your estimate of $144 for the value of the Gish wall, if it is held, it was used by Walker, is for what thickness of wall?

If Walker should pay the amount of your estimate $144, would he do so in disregard of the relief from reimbursing Gish granted by section 74 of the Building Regulations, or because he did not comply with that section by building an independent wall?

Did you prepare this estimate because, as Building Inspector, you found the wall was not an independent wall?

2. That the court erred in failing to determine or, consider the constitutional question raised by assignment of error No. 7 based on defendant's Prayer No. 8 in the trial court, for the right to use your neighbor's land for the erection of a party wall sounds in contract and the wall must be of mutual benefit and common use, and any other taking of land is confiscatory and in contravention of the Fifth Amendment of the Constitution, and such taking which enables the first builder to have 4½ inches of wall on her side of the party line instead of 9 inches and forces the adjoining owner to have 17½ inches of wall on his side of the party line is taking property without due process of law or just compensation.

3. That the court erred in failing to determine or consider assignment of error No. 8 based on plaintiff in error's Prayer No. 9 in the trial court, for it has been held by the United States Supreme Court, that a party wall to be justified and not unconstitutonal, must be of mutual benefit and common use and to substitute the test of use for the test of usefulness, is to disregard the conditions which the Honorable Supreme Court has said will make a party wall an unconstitutional taking of land.

4. That the court erred in failing to determine or consider the constitutional question raised by assignment of error No. 9 based on plaintiff in error's Prayer No. 10 in the trial court, for the right to erect a party wall one-half on your neighbor's lot is based on a contract in the deeds from the original proprietors to Beall and Gantt trustees for the purpose of laying out and establishing the Federal City and plaintiff in error's land being without the *the* bounds of the original city is unaffected by such contract and unless plaintiff in error's consent or contractural agreement thereto has been secured, the use and occupation of his land was without due process of law and just compensation and in contravention of the Fifth and Fourteenth Amendments of the Constitution.

ARGUMENT.

I.

To show how the property of the plaintiff in error, Walker, was taken and given to the defendant in error, Gish, by operation of a building regulation which by the act of Congress of June 14, 1878, was a law of the United States, certain questions were asked Morris Hacker, former Inspector of Buildings (Rec., pp. 6, 7). These questions were asked for the purpose of providing a foundation for the constitutional objections urged at the trial and if answered, would have shown the jury, that if Walker paid for half of the Gish wall he would actually pay for 13½ inches of wall, whereas, defendant in error would only pay for 4½ inches of wall. If the Gish wall had not been built first and Walker had not attempted to build a party wall, without his neighbor's consent, he would have had only to build a 13-inch wall, so that by means of this regulation, as interpreted by the Court of Appeals, one-half inch of his land was taken and given to the defendant in error and he was required to pay for three times as much wall, *in invitum*, as the first builder because she called it a party wall. If plaintiff in error had had the opportunity of building a 13-inch wall wholly on his own land, Gish or her predecessor in title, would have had to build a 9-inch wall wholly on her own lot. So by building this alleged party wall, which the plaintiff in error was forbidden to use for a three-story house, the defendant in error got only 4½ inches of wall on her side of the line and gained 4½ inches of interior space and placed on Walker a loss of 7 inches of interior space which he could have had, if the defendant in error had built a 13-inch party wall which Walker could have used for a three-story house.

The Court of Appeals sustained the denial of answers to these questions on the ground that the law of the case was that the only question was "whether there had been a use of the wall."

In the first trial of this case before Mr. Justice McCoy and a jury, plaintiff in error was successful and a verdict was directed in his favor. Gish *vs.* Walker, 48 App. D. C., 42. The first decision by the Court of Appeals practically directed a verdict for Gish and at that time the constitutional question was sought to be raised by a petition to this court for a writ of certiorari, No. 587, October Term, 1918. On page six of said petition plaintiff in error urged:

> The said decision, while remanding the case for a new trial before a jury below, in effect, directs a verdict for respondent in the following words:
>
> > "if these facts be true we think he so used the wall as to entitle plaintiff to recover." Gish *vs.* Walker, 48 App. D. C., 42.

And Mr. Justice Stafford did not disappoint the fears of plaintiff in error but eliminated from the case every question constitutional and otherwise, but the simple question "whether there had been a use of the wall."

But on authority of this Court in the case of Smoot *vs.* Heyl, 227 U. S., 518, that can not be the only question. There this Court said:

> "It is manifest that not every sort of construction projecting over the boundary, although it may form part of the exterior wall of a building can be called a party wall. Instead of being for the common use, it may be merely an injurious protuberance.

Under authority of this case if the plaintiff in error had known it in time he could have enjoined the construction of this wall which in the language of the case was "a nuisance rather than a benefit." How can plaintiff in error be required to pay for what this court has determined constitutes a nuisance?

But the law of the case is not as severe as the Court of Appeals would make it.

> "It is the settled law of this court, as of others, that whatever has been decided on one appeal or writ of error can not be re-examined on a second appeal or writ of error brought in the same suit.
>
> Thompson *vs.* Maxwell Land Grant Co., 168 U. S., 456.
>
> "The doctrine of law of the case extends only to the questions squarely presented and distinctly passed upon on the former trial."
>
> Hunter *vs.* Porter, 10 Idaho, 86.

In the first trial the only question determined was whether plaintiff in error had built such an independent wall as would discharge him from liability under the statute. That left all other questions open and it was error to exclude questions which would show that defendant in error's wall amounted to a taking of property without due process of law and without just compensation and amounted to a trespass and was, in fact, "a nuisance rather than a benefit."

II.

According to the decision of the Court of Appeals herein (Rec., p. 14) if you did not tear down defendant in error's wall, which at common law you could not, you would have to pay for one-half of it, or build a

13-inch wall wholly on your own land, and not use any of your land in front of defendant in error's wall or any of your land under it, by overlapping above, or even preserve its usefulness to the defendant in error, Gish. by enabling her to use her own chimney.

This must be a modern application of the principle. Vigilantibus et non dormientibus jura subvenient.

For by getting the wall up first without notice to any one, the first builder of a two-story house in effect says to her neighbor, you can not build a three-story house here, for I have the wall up first, and it is only for a two-story house, and can only be used for a two-story house, and if you want a three-story house, you can not even touch my wall, but must build a 13-inch wall wholly on your own land, and let me have the use of 4½ inches of your lot.

For the Court of Appeals in the instant case says if you build a 9-inch, independent wall in such a way as the building regulations require. Gish *vs.* Walker, 48 App. D. C.. 42, you will have to pay for 4½ inches of the two-story wall (Rec., p. 7).

This is certainly appropriating 4½ inches of the plaintiff in error's lot for the sole benefit of the builder of the two-story house. The benefit so far from being mutual is all for the builder of the two-story house, she only pays for 4½ inches of wall on her lot, and has two inches more interior space in her house, while the plaintiff in error, if he builds a 9-inch independent wall and takes the consequences, he must, by the decision in Gish *vs.* Walker, 48 App. D. C., 21, pay for 13½ inches of wall and has 7 inches less interior space in his house, than he would have had, had a proper 13-inch party wall for common use been built.

The result of which is the building owner must surrender 4½ inches of his lot and build a 13-inch wall and lose the use of 11 inches of ground or pay for one-

half the cost of a nuisance. If party walls could exist only by contract outside the original Federal City the plaintiff in error could have had a chance to require that if a party wall was erected between the two premises, it should be a 13-inch wall which he could have used for a three-story house and the defendant in error could have used for a two-story house. Then $6\frac{1}{2}$ inches would have rested on her lot and she would have had to recognize the right of plaintiff in error to the use of $6\frac{1}{2}$ inches instead of $4\frac{1}{2}$ inches of her land, as recently stated by this court

> "the land owner does not have the right to that part of his land except as so qualified."
>
> Jackson *vs.* Rosenbaum.

But by virtue of the exceptions in section 56 of the Regulations Governing the Erection, etc., of Buildings, extended throughout the District by the Act of 1878 the right of the plaintiff in error to have a 13-inch party wall on the division line is denied him and a right to have a 9-inch wall is granted the first builder if she builds a two-story house.

The Court of Appeals in the Fowler *vs.* Koehler case, after much research, which would seem to prove the contrary, determine that party walls exist outside the original Federal City by custom only.

> But buildings in large sections of the District of Columbia have been constructed in accordance with an established custom that where the owner of a lot upon which a party wall has been constructed connects his building to it, he should pay his neighbor the value of the portion of the wall used. This custom was extended outside of the limits of the original city, probably in the belief that the regulation of President Washington was in force throughout the District of Columbia. The enforcement, as to walls now in existence, of

> the custom thus established, will tend to uniformity throughout the District; and for that, if for no other reasons, the court should hesitate to adopt a stricter rule which might result in much confusion.
>
> Fowler *vs.* Koehler, 43 App. D. C., 360.

To bring the instant case within this decision it would be necessary to add the words "express or implied" or "actually or by implication" at the end of the first sentence.

If section 74 of the Regulations Governing the Erection, etc., of Buildings is in force outside the original Federal City it is so in force by virtue of the Act of Congress of June 14, 1878.

It has been wittily said the Volstead Act is in force but not enforced. By this decision, the Court of Appeals decides section 74 is enforced but not in force.

But if thereunder the first builder can occupy the building owner's land and put up a wall which will save her two inches of her lot in any event, and if torn down by the building owner in order to secure a 13-inch wall for a three-story house 8½ inches must be placed on the lot of the plaintiff in error it is not a party wall, but a trespass and a disseizin and would be if it were within the bounds of the original Federal City, by virtue of the admitted contract there existing and can not be any less so, because it exists by custom outside of the original Federal City and not by virtue of the act of Congress. Calling it a custom can not change the fact, it is a nuisance and a taking of 2 inches of plaintiff in error's lot without just compensation and due process of law by an authority exercised under the United States which is invalid and in contravention of the Fifth Amendment of the Constitution.

But according to Justice Cox in Fowler *vs.* Saks, plaintiff in error could not tear down the wall except by virtue of this statute and in accordance with its terms. So if

he should elect to tear the defendant in error's wall down and build a party wall he could use, he could only do so by virtue of section 74 being in force outside of the original Federal City by virtue of the Act of Congress of June 14, 1878.

Now if the building owner elects to take the other horn of the dilemma and build an independent wall he must pay for one-half of this nuisance or erect a 13-inch wall wholly on his own land. This last election would be a surrender to the first builder of the two-story house of 4½ inches of the building owner's lot.

Thus the vigilance of the first builder would be rewarded by putting 17½ inches of wall on the building owner and 4½ inches on the first builder's lot. Whereas if it were not for this section 74 the worst that could happen to the building owner would be a 13-inch wall wholly on his own land. Under the application of section 74 in the instant case by the Court of Appeals the best that can happen to a building owner now is to pay for 13½ inches of wall while the first builder pays for 4½ inches. There is certainly no mutual benefit or common use in such a wall.

A building regulation having the same force within the District as if enacted by Congress, which so takes the property of plaintiff in error, does so without due process of law and just compensation and is unconstitutional and void as being in contravention of the Fifth Amendment of the Constitution.

III.

Upon the merits we need not go beyond the point on which the Court of Appeals rested its decision. The Court held that the wall placed on the appellee's land was not a party wall. In the building regulations a party wall is defined as "a wall built upon the dividing line between

> adjoining premises for their common use." The fundamental idea is that of mutual benefit. It is manifest that not every sort of construction projecting over the boundary can be called a party wall. Instead of being for the common use it may be merely an injurious protuberance. Appellees can derive no such benefit from it as the servient owner is entitled to receive as compensation for the taking and occupation of his land. It constitutes a nuisance rather than a benefit.
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> Smoot *vs.* Heyl, 227 U. S., 523.
> Runge *vs.* Koch, 141 N. Y. S., 283.

Thus Mr. Justice Hughes describes a bay window projection 6½ inches by the length of 8 feet, which in no way interferred with any building or building construction of the appellee, Heyl.

How aptly it describes the 4½ inch projection of the so-called party wall of the defendant in error, Gish! There can be no doubt that under the authority of this case plaintiff in error could have enjoined the construction of this wall. But when he came to build his three-story house he found it there and built the wall he did under the requirements of the Building Inspector (Rec., p. 7). But its presence certainly proved a nuisance and not a benefit and it seems like a miscarriage of justice that plaintiff in error can be required at law to pay for that which in equity would be declared a nuisance and of no mutual benefit and common use and the owner required to remove.

In the instant case the Court of Appeals has abandoned the rule of usefulness which this court affirmed in the Smoot *vs.* Heyl case, and has adopted a rule of use. This is going one step in advance of the Fowler *vs.* Koehler case where the usefulness of the wall was not questioned and its use admitted.

On the other hand, the majority of the courts in this country adhere to the hard and fast rule of the common law that a person dispossessed becomes absolutely entitled to all improvements made without his request and sanction, without paying for them; and whether the entry is tortious or in good faith, the rule is the same. Automarchi *vs.* Russell, 63 Ala., 356, 35 Am. Rep., 40; Sherred *vs.* Cisco, 4 Sandf., 480; Orman *vs.* Day, 5 Fla., 385; Allen *vs.* Evens, 161 Mass., 485, 37 N. E., 571; Griffen *vs.* Sanson, 31 Texas Civ. App., 560, 72 S. W., 864; List *vs.* Hornbrook, 2 W. Va.. 340.

Where this an isolated case and of no public importance, we might be inclined to the latter view.

Fowler *vs.* Koehler, 43 App. D. C., 360.

In other words, after research, having found what the law is because so many people have broken it they will not enforce it. "Ignorance of the law is no excuse," but where in the record is it disclosed how many people have attempted to build party walls without the consent of their coterminous owners? Indeed, in the case of Smoot *vs.* Heyl, as reported in 34 App. D. C., 484, it appears that the Inspector of Buildings had been refusing to locate party walls outside the bounds of the original Federal City.

SEPTEMBER 15, 1905.

MR. L. E. SMOOT,
Foot of Third Street, S. E.,
WASHINGTON, D. C.

DEAR SIR: Your communication of September 14th, notifying the office of your change of plans and plat to locate party wall at 2007 Wyoming Avenue received, and in reply beg to say that notice will be filed with the permit, with the understanding that the party wall is located on

your own responsibility without authority from this office, as I do not, at the present time locate party walls outside of Florida Avenue or Washington City, proper.

Very respectfully,

S. ASHFORD,
Inspector of Buildings.

But having departed from principle and adopted the rule of expediency the next step is to abandon the rule of usefulness and adopt the rule of use, actual or implied, as though this were an action of assumpsit instead of a case of disseizin on the part of the defendant in error.

In the instant case the use is implied from the fact that the building owner has secured a 13½ inch wall wholly on his own land, whereas if the wall of defendant in error had not been there he would only have had to build a 13-inch wall or if defendant in error had tendered him a party wall he could have used, he need not have had but 6½ inches on his land.

Even if the doctrine of implied use can be applied to party walls, in the instant case it would amount to a taking of one-half inch of the plaintiff's land without just compensation in contravention of the Fifth Amendment.

So that whichever horn of the dilemma the building owner of the three-story house takes the vigilant first builder of the two-story house has the advantage. If he elects to build an independent wall he must build it 13 inches wholly on his own land or pay the first builder for 4½ inches of wall he is forbidden by law to use for the decisions in this case makes the building of an independent 9-inch wall impossible. If he elect to tear down the alleged party wall his 13-inch wall must not go beyond the face of the existing wall and he must build 8½ inches on his own land while the first

builder of the two-story house has only 4½ inches on his land. The supposed privilege of building an independent 9-inch wall is eliminated and the decision in the instant case is that the building owner must tear down the offending wall placed there *in invitum* or build a 13-inch wall. This gives the party wall privilege to the first builder of a two-story house and takes it away from the building owner of a three-story house whatever use and benefit a party wall might have been to him if "built upon the dividing line between adjoining premises for their common use." Or he must remember the axiom, Vigiliantibus et non dormientibus jura subvenient and build a 13-inch wall first and thereby force the builder of the two-story house to have 6½ inches of wall on her side of the party line.

This is in contravention of the Fourteenth Amendment of the Constitution because it denies him the equal protection of the laws.

IV

On authority of that eminent jurist, Walter S. Cox, the Building Regulations promulgated by General Washington are the only source of the right claimed by anyone here to locate his party wall one-half on his neighbor's land.

> "Under the authority of the deeds executed by the original proprietors of land within the District to the trustees Beall and Gantt which are very well known in this District, and of the Act of Maryland of 1791, making the session of the District to the United States General Washington promulgated certain building regulations, one of these is in the following terms:
>
> OCT. 17, 1791.
>
> That the person or persons appointed by Commissioners to superintend the buildings may enter

on the land of any person to set out the foundations and regulate the walls to be built between party and party as to the breadth and thickness thereof, which foundation shall be laid equally upon the lands of the persons between whom such party walls are to be built, and shall be of the breadth and thickness determined by such person proper, and the first builder shall be reimbursed one moiety of the charge of such party wall or so much thereof as the next builder shall have occasion to make use of before such next builder shall any way use or break into the wall. The charge or value thereof to be set by the person or persons so appointed by the Commissioners.

"This building regulation, so authorized, is the foundation and the only source of the right claimed by any one to locate his party wall one-half on his neighbor's land."

Fowler *vs.* Saks, 18 D. C., 579.

So in its source and origin the party wall in Washington sounded in contract and the founders of this city well knew that:

"What we understand now by a party wall had no existence at common law, except by convention between coterminous proprietors."

Fowler *vs.* Saks, 18 D. C., 578.

And they embodied the contract regarding such walls in the deeds from the original proprietors to the trustees, Beall and Gantt, for the purpose of laying out and establishing the Federal City . And the building regulations which so far as they relate to party walls have their origin in this contract define party walls as—

"a wall built upon the dividing line between adjoining premises for their common use."

Regulations Governing the Erection, etc., of Buildings, section 1, page 10.

This contractual right never existed outside of the original Federal City:

> It follows that the right conferred by the regulations of President Washington is one purely in contract, imposed by the condition in the original grant.
>
> Fowler *vs.* Koehler, 43 App. D. C., 356.

But the Court of Appeals in the last cited case after stating "in the absence of statutory or contractual authority, such a servitude may not be imposed," finds a new kind of party wall not known to the common law, not provided by statute or contract, but existing by custom—

> But buildings in large sections of the District of Columbia have been constructed in accordance with an established custom that where the owner of a lot upon which a party wall has been constructed connects his building to it he should pay his neighbor the value of the portion of the wall used.
>
> Fowler *vs.* Koehler, 43 App. D. C., 360.

But the instant case shows that this alleged custom may be an imposition and a cover for thrusting on your neighbor a burden which will be to your gain and his loss. The logical result of the abandonment of principle and the adoption of expediency follows and the value of the wall to be paid for by custom, is no longer measured by the usefulness to the building owner but may be a presumptive or implied use which can only be avoided by electing to tear down the wall and accepting the loss of 2 inches of land and bearing both the expense of destruction and construction. If it had not been for the privilege so acquired by custom according to the Fowler *vs.* Koehler case defendant in error Gish would have had to build a 9-inch wall wholly on her own lot for a two-

story house and the plaintiff in error would have been privileged to build a 13-inch wall instead of a 13½-inch wall which would have been better for his house than a 9-inch wall which had to be made top-heavy by widening to 13 inches when it reached the third story to comply with the Regulations Governing the Erection, etc., of Buildings.

By building first without leave or contract with the adjoining owner the predecessor in title of defendant in error places only 4½ inches of wall on her lot, never knowing whether such a wall will comply with the building regulations and be "built upon the dividing line between adjoining premises for the common use" merely being concerned with conserving her own land and getting results with the use of only 4½ inches of her lot.

This modern idea of a party wall must be on the principle that what is a luxury of one generation is a necessity for the next. It is very different from the idea of a party wall held by the last generation:

> This servitude, imposed *in invitum*, is to be construed with the utmost strictness. It renders the occupation of another's land lawful only when the wall with which it is occupied satisfies the reason and purpose for which the easement was imposed. The servient owner is compelled to submit to the burden only on the ground that the thing imposed is, in contemplation of law a benefit equally to him and to the dominant owner; in other words, that it at once stands ready for his enjoyment for all the purposes for which a party wall is intended to serve. These purposes include several uses. It is intended, in the first place, to serve for the support, at any point, of the beams which the servient owner may reasonably have occasion to insert in a supporting wall. This forbids the construction of openings where beams can not be inserted and support can not be afforded. In the next place it is intended to serve the

purpose of a complete division between adjoining houses. This forbids the construction of spaces in it which do not divide.

Corcoran *vs.* Nailor, 6 Mackey, 583.

If party walls do not exist outside the bounds of the original city by contract they must exist by statute or be a trespass and disseizin and not a custom. You can not recover for a trespass and "the hard and fast rule of the common law that a person dispossessed becomes absolutely entitled to all improvements" must be correct:

"A predecessor in title of the plaintiff, being the owner of one of the lots, strengthened the foundation and built the party wall higher. The defendants, owing the adjoining lots, built their house higher, and used the wall so built by the plaintiff's predecessor in title. After this had been done, the plaintiff brought his lot and now seeks to make the defendants pay for using the wall. There was no stipulation or agreement in any form that such payment should be made, and there is no implied contract to pay for such use of a party wall."

Allen *vs.* Evans, 161 Mass., 486.

"Moreover, unless defendants had the right to enter and construct a party wall. they were mere trespassers."

Robinson *vs.* Hillman, 36 App. D. C., 580.

It would seem from the decision of this Court in the case of Smoot *vs.* Heyl, it was not necessary to find an authority for party walls outside the original Federal City in custom and to establish a kind of common law party wall, for this Court there said it was by the authority of the Act of Congress of June 14, 1878:

The Act of June 14, 1778, c. 194, 20 Stat., 131, authorized the Commissioners of the District of

> Columbia to make "such building regulations for the said District as they may deem advisable" and provided that these should have the same force within the District as if enacted by Congress.
>
> Smoot *vs.* Heyl, 227 U. S., 521.

But the Court of Appeals erred in its interpretation of this decision for it says:

> The Acts of Congress are not important in this connection, since no attempt has been made either by Congress or the Commissioners of the District of Columbia, to enact a law or ordinance legalizing the erection of party walls. It may well be that the acts of Congress only conferred power upon the Commissioners to regulate the construction of party walls where authorized under existing conditions.
>
> Fowler *vs.* Koehler, 43 App. D. C., 355.

Section 74 of the Regulations Governing the Erection, etc., of Buildings is enforced outside of the bounds of the original Federal City by virtue of this Act of Congress and any taking by a coterminous owner of any portion of his neighbor's land for a party wall by virtue thereof, unless just compensation is given therefor and the taking is by due process of law is unconstitutional and in contravention of the Fifth and Fourteenth Amendments to the Constitution.

Even the Building Regulations approved by President Washington, while being, "purely in contract" provided for a process of law in taking the land of coterminous owners for the purpose of party walls:

> The person or persons appointed by the Commissioners to superintend buildings may enter upon the land of any person to set out the foundations and regulate the walls to be built between party and party, as to the breadth and thickness thereof, which foundations shall be laid equally upon the lands of the persons between whom

such party walls are to be built, and shall be of the breadth and thickness determined by such person proper.

Regulations Governing the Erection, etc., of Buildings, Sec. 62.

But according to the Fowler *vs.* Koehler case this taking of part of your neighbor's land for the first builders' house has gotten to be a custom and not a due process of law.

The reading of section 74 of the Regulations Governing the Erection, etc., of Buildings, which has now amended the Building Regulations as approved by General Washington, will show that the regulation was drawn in utter disregard of the Fifth Amendment and provides for neither due process of law nor just compensation.

The party wall which exists by custom as described by the Court of Appeals is merely a trespass upon the land of the building owner and in the instant case amounted to a disseizin. This description of the party wall prevailing by custom shows how the modern idea of a party wall differs from that announced by the Supreme Judicial Court of Massachusetts only as far back as 1884.

> The provision in question undertakes to deal with private property, and to authorize one man to appropriate and use the property of another without his consent. It assumes to take private property without due process of law and without compensation. It is repugnant to the fundamental principles declared in the Declaration of Rights that the property of the subject shall not be appropriated even for public use, without paying him a reasonable compensation therefor.
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> Wilkens *vs.* Jewett, 139 Mass., 30.
>
> Traute *vs.* White, 46 N. J. Eq., 437.

Considering this wall in the instant case in the light of this Massachusetts decision would an alleged party wall 4½ inches on the land of defendant in error and 13½ inches on the land of plaintiff in error, three-fourths on one coterminous owner and one-fourth on the other's land erected under and by virtue of an Act of Congress be repugnant to the fundamental principles of the Fifth Amendment to the Constitution, part of the American Bill of Rights.

Brice's American Commonwealth, part 1, page 28.

Would it not also be repugnant to the Fourteenth Amendment because the plaintiff in error is denied the equal protection of the laws?

A related question is whether the defendant in error acquired by due process of law the portion of the 9-inch wall resting on plaintiff in error's lot so as to entitle her to sue therefor. In the Fowler *vs.* Koehler case, the Court of Appeals held the first builder could reserve his right of action against the building owner. If it can be reserved why does it pass by a deed for the first builder's lot and improvements thereon when it is not included in the description or referred to in the deed. It has been "held to be a personal covenant and not to run with the land."

> In Hurd *vs.* Curtis, Wilde, J., declared that the rule, that no covenant can run with the land so as to bind the assignee to perform it unless there was privity of estate between the covenanter and covenantee was without exception. Washburn, in his learned work says "that when one makes a covenant with another in respect to land, neither parts with nor receives any title or interest in the land at the same time with and as part of making the covenant, it is at least a mere personal one, which does not bind his assignee; and that such covenants and such only, run with the land as concern the land itself in whomsoever hands

it may be, and become united with and form a part of the consideration for which the land or some interest in it is parted with between the covenanter and covenantee" and he illustrates the rule by saying "when one of two adjacent owners of land covenanted with the other that, if he would erect a party wall between their estates the former would pay the latter for one-half of it whenever he should use it, it was held to be a personal covenant, and not to run with the land so as to bind the purchaser of the covenanter's land, who should erect a building against the party wall."

Cole *vs.* Hughes, 54 N. Y., 449;
Behrens *vs.* Hoxie, 26 Ill. App., 417;
Hart *vs.* Lyon, 90 N. Y., 663;
Weeks *vs.* McMillan, 13 Daly (N. Y.), 139;
Curtis *vs.* White, Clark Ch., 389;
Tood *vs.* Stokes, 10 Pa. St., 155;
Sharp *vs.* Cheatham, 88 Me., pp. 502, 503;
Nalle *vs.* Paggi (Tex.), 9 S. W. Rep., 205;
Brooks *vs.* Curtis, 50 N. Y., 639;
Black *vs.* Ishman, 28 Ind., 37;
Weld *vs.* Nichols, 17 Pick., 543;
Brown *vs.* Penty, 1 Abb. (N. Y.) App. Dec., 227;
Gibson *vs.* Holden, 115 Ill., 199;
Holden *vs.* Gibson, 16 Ill., App., 411;
Davis *vs.* Harris, 9 Pa. St., 501;
Gilbert *vs.* Drew, 10 Pa. St., 219;
Huling *vs.* Chester, 19 Me. App., 607;
Orman *vs.* Day, 5 Fla., 385;
McDonald *vs.* Culver, 8 Hun, 155;
Rawson *vs.* Bell, 46 Ga., 19;
Crawford *vs.* Krollpfeiffer, 195 N. Y., 185.

The defendant in error, Gish, admits that the party wall, one-half on Walker's lot and one-half on her's,

was there when she purchased the house 2327 Ashmead Place (Rec., p. 7).

The certified copy of the deed by which title was vested in defendant in error to lot numbered two hundred and fifty-eight in Pumphrey and Bayne's subdivision of lot number nineteen (19) "Washington Heights," shows only the conveyance to Genevive K. Gish of said lot and improvements, rights, privileges and appurtenances (Rec., p. 8).

The portion of the party wall resting on appellant's lot was not an appurtenance of lot numbered two hundred and forty-eight (248) in Pumphrey and Bayne's subdivision of lot numbered (19).

> By his contract with Johnson and subsequent erection of a wall upon the division line Currier acquired no interest in the adjoining land, and retained no title in that part of the wall which extended beyond his own line. . . . The plaintiff, therefore, by acquiring Currier's interest in the land acquired no interest in that part of the division wall which rested upon the adjoining lot even if the defendant by reason of the clause in the deed by which its title was derived referred to the contract, and by the use of the wall might be held chargeable for the cost of the half so used, there is no privity of contract or estate which will enable the plaintiff to recover it in an action at law. The contract was merely a personal one with Currier. The right to enforce it would not pass with the land as an appurtenance, and there is nothing in Currier's deed to show an intent that it should pass; nor is such a contract assignable at law.
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> Joy *vs.* Penny Saving Bank, 115 Mass., 62.

We conceived that the whole matter had been reduced to a money obligation, personal to her, and that it could no more be regarded as an appurtenance to the property out of which it had

grown than could a claim for rent of that property previously due.

Eberly *vs.* Behrend, 20 D. C., 218.

The Court of Appeals took the same view.

The right to compensation is a mere personal claim which the law establishes against the adjoining owner when he elects to use the wall, but it creates no interest either in the property or the wall adverse to such owner.

Fowler *vs.* Koehler, 43 App. D. C., 362.

Respectfully submitted,

S. HERBERT GIESY,
Counsel for Plaintiff in Error.

WALKER *v.* GISH.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 135. Argued November 28, 29, 1922.—Decided January 2, 1923.

1. The rule allowing a lot-owner to erect a party wall on the lot line, and obliging his neighbor, if he use it, to pay part of the cost, is a condition attached to the lots within the original Federal City under the powers granted by the original proprietors of the land;

and, as extended to other parts of the District under an act authorizing the District Commissioners to establish building regulations, it has the force of a custom binding wherever a party wall is erected by one lot-owner without objection by the adjoining owner. P. 449.

2. And, in the absence of evidence to the contrary, it must be presumed that the erection of such a wall was done without such objection. P. 451.

3. A lot-owner who used a party wall waived his right to object, in defense of an action for the value of the use, that the building regulations, with which he complied, deprived him of his property without due process of law. P. 452.

51 App. D. C. 4; 273 Fed. 366, affirmed.

Error to a judgment of the Court of Appeals of the District of Columbia affirming a judgment for Gish in an action to recover the value of the use of a party wall by Walker.

Mr. S. Herbert Giesy for plaintiff in error.

No appearance for defendant in error.

Mr. Chief Justice Taft delivered the opinion of the Court.

Genevieve K. Gish sued Ernest G. Walker in the Municipal Court of the District of Columbia for $150 for the use of a party wall on premises 2327 Ashmead Place, Washington, in that part of the District of Columbia not included in the original Federal City, and recovered $144.63. Walker appealed the case to the Supreme Court of the District. That court on the first trial directed a verdict for Walker, the defendant, on the ground that he had not used the wall. On appeal, the Court of Appeals of the District reversed the judgment because the question whether the defendant used the wall was a disputable fact which should have been submitted to the jury. On the second trial, the court submitted the issue to the jury which found for the plaintiff, and fixed

the value of the use at $85. The Court of Appeals affirmed the judgment, and the case comes here by writ of error on the issue of the constitutional validity of the building regulations of the District of Columbia, which by the Act of June 14, 1878, c. 194, 20 Stat. 131, are given the effect of congressional legislation. It is urged that they deprived defendant of his property without due process of law, in violation of the Fifth Amendment. The question was seasonably raised by a request for a charge on the trial and by proper assignment of error in the proceedings for review. Judicial Code, § 250; *Smoot* v. *Heyl*, 227 U. S. 518, 522.

The history of the law of party walls in Washington is interesting. Its application is not free from difficulty in that part of the present Washington which was not included within the original Federal City. The original proprietors of the land in the Federal City conveyed it in trust to certain named persons to be laid out in such streets, squares and lots as the President of the United States should approve. Under the trust provisions, the lots to be sold or distributed were to be subject to such terms and conditions as might be thought reasonable by the President for regulating the materials and manner of the buildings and improvements. President Washington issued regulations, one of which is in force today. They provided that a person appointed to superintend buildings might enter on the land of any person to set out the foundation and regulate the walls to be built between party and party, as to the breadth and thickness thereof, that the foundations were to be laid equally upon each lot and to be of the breadth and thickness thought proper by the superintendent, that the first builder was to be reimbursed one-half of the cost of the wall, or so much thereof as the next builder might use, but that such use could not begin till he had paid the amount fixed by the superintendent. This has been held to be a condition

annexed to every house lot in the original Washington. *Miller* v. *Elliot*, 5 Cr. C. C. 543; 17 Fed. Cas. 315, No. 9568. It has been decided to be the only source of the right of a lot owner in Washington to put his party wall on his neighbor's land. *Fowler* v. *Saks*, 7 Mackey, 570, 579. By the Act of Congress of 1878, *supra*, the District Commissioners were authorized to establish building regulations which should have the force of law; but the regulation of General Washington was continued in force by them and applied not only to the Federal City but to the whole of Washington. The question then arose what was the effect of this regulation as applied to the outlying districts of the city which were not included in the lots of the Federal City, and which were not affected by the grant upon condition by the original owners of that city. This question was fully considered in the case of *Fowler* v. *Koehler*, 43 App. D. C. 349, which was a suit like the one at bar for the value of appropriated use of a party wall in the newer part of the city. The Court of Appeals of the District held that because party walls had in thousands of instances been erected by one of the adjoining owners on the lot of the other in the belief of both that it was the exercise of a lawful right as in the original city, a custom had grown up. So general was this that the court felt justified when erection of a party wall by one owner was without objection by the other, in implying an agreement which would rebut inference of a trespass. Thus there had developed a practical uniformity as to practice in respect of party walls and the law governing them between the lots in the Federal City and those outside, except where, in the outlying district, the adjoining owner objected to the erection of the wall at the time of the construction and took measures to prevent it. The court in *Fowler* v. *Koehler* further held that where party walls were erected in the outside district under such implied agreements, the same obligation to

contribute to the cost of the wall arose in the outlying district as against the adjoining owners as in the Federal City, if they used the party wall, and that the relations between the parties were regulated by the District building regulations.

We think the reasoning of the court in *Fowler* v. *Koehler* sustains its conclusion and that the conclusion helps to the solution of an unfortunately difficult matter of much importance. The status of the party wall in the case at bar is thus established. There is no evidence of the circumstances under which the party wall was erected and we must presume that it was done by the predecessor in title of the plaintiff below with the consent of a grantor of the defendant below.

Plaintiff in error says that even if this be true, the effect of the District regulations is equivalent to a statute and deprives him of his property without due process of law. The effect of §§ 74 and 56 of those regulations is, shortly stated, this: One of the two adjoining owners may build a two-story house and a party wall nine inches thick, occupying 4½ inches of his neighbor's land. If, thereafter, his neighbor wishes to build a house of three stories, that neighbor is required to have his wall 13 inches thick. He can take down the existing party wall, but he can occupy only 4½ inches of the other's lot and must pay all the expenses of the change, including the damage done to the owner of the two-story house, so that his party wall will be 8½ inches on his own land, while he uses but 4½ inches of his neighbor's. Or he can build a nine-inch wall against the two-story wall and widen his wall to 13 inches when it reaches the third story, resting on 4½ inches of the original party wall on his own land. He thus is compelled to occupy with his wall 13 inches of his own lot and let his neighbor have 4½ inches of his land without corresponding advantage. Counsel for plaintiff in error urges that the fundamental idea in the

institution of party walls is mutual benefit, (*Smoot* v. *Heyl*, 227 U. S. 518, 523), which implies equality of easement of support and of occupation of land between the neighbors, and that to give to the builder of the first wall such great advantage over his neighbors as these regulations give him deprives his neighbor of property without due process of law.

The questions thus raised might justify discussion if the plaintiff in error were in a position to urge them, and had not used the original party wall of which he complains. His contention below was that he had not used the wall of his neighbor, that he had built a new wall at the side of the original party wall as high as the original wall and then had widened it to 13 inches so as to extend over the original wall without resting on it. The jury found against him on this issue. If he did use the original wall, then he must pay for the value of the use. *Fowler* v. *Saks*, 7 Mackey, 570, 581; *Fowler* v. *Koehler*, 43 App. D. C. 349, 360. In using it, he waived the right to object to the regulations with which he complied without objection, until he was called upon to pay his share of that which he had taken and used.

The judgment is affirmed.